INTERSCOPE VERSICHERUNG SDN BHD

v.

SIME AXA ASSURANCE BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL MALEK AHMAD JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEALS NOS: W-02-572-96 & W-02-664-95]
21 APRIL 1999

ARBITRATION: *Stay of proceedings - Arbitration Act 1952, s. 6 - "taking any other steps in the proceedings" - Entering unconditional appearance - Whether amounts to taking a step in the proceedings - Whether arbitration agreement affects right of parties to commence or jurisdiction of court to entertain legal proceedings*

CIVIL PROCEDURE: *Stay of proceedings - Arbitration agreement - Arbitration Act 1952, s. 6 - "taking any other steps in the proceedings" - Entering unconditional appearance - Whether amounts to taking a step in the proceedings - Whether applications for adjournment and stay should be allowed*

The respondent entered into an underwriting agreement ('the agreement') with the appellant under bywhich the appellant was to receive commissions and management expenses for the policies underwritten by the appellant. The agreement contained an arbitration clause in the event of disputes between the parties. Subsequently, a dispute arose wherein the appellant claimed the sum of RM445,753.98 from the respondent. The debt was not expressly denied by the respondent which sought time to verify the claim but the appellant commenced an action for recovery. After the writ was served, the respondent entered an unconditional appearance.

The appellant then filed a summons for judgment while the respondent filed an application to stay the action pending its reference of the dispute to arbitration. The respondent failed to file an affidavit in reply and the senior assistant registrar entered judgment for the appellant after refusing the respondent's application for an adjournment. The respondent appealed to the judge in chambers who allowed it and set aside the judgment. The appellant appealed to the Court of Appeal ('the first appeal'). Meanwhile, the respondent's application for a stay was heard by the senior assistant registrar who dismissed it. The respondent then appealed to the judge in chambers who allowed the appeal and stayed the appellant's action. The appellant also appealed against this order to the Court of Appeal ('the second appeal').

The issues before the Court of Appeal were: (i) whether the entry of an unconditional appearance amounted to taking a step in the proceedings within s. 6 of the Arbitration Act 1952 ('the Act') so as to preclude the application for a stay in the second appeal; and (ii) whether the learned judge had erred in setting aside the judgment against the respondent in the first appeal.

Held:
Per Gopal Sri Ram JCA

[1] The entry of an unconditional appearance constitutes the taking of a step in the proceedings within s. 6 of the Act. If a defendant intends to apply to stay an action in reliance of s. 6 of the Act, he must enter a conditional appearance before moving the court. Since the respondent here had taken a step in the proceedings, it lost the right to invoke s. 6 of the Act. The foundation upon which the respondent's application rested was non-existent and the senior assistant registrar was correct in exercising his discretion in refusing the adjournment.

[2] The evidence taken as a whole reasonably supported the inference that the respondent was merely delaying the payment of the sum that was due to the appellant.

[3] The order staying the action was set aside. The judgment summarily entered by the senior assistant registrar against the respondent was restored to file.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden telah memasuki satu perjanjian 'underwriting' ('perjanjian tersebut') dengan perayu di mana perayu akan menerima komisyen dan perbelanjaan pengurusan untuk polisi yang dikendalikan olehnya. Perjanjian tersebut juga mengandungi satu peruntukan timbangtara jika berlakunya pertelingkahan di antara kedua pihak. Selanjutnya, pertelingkahan tertimbul di mana perayu menuntut sejumlah RM445,753.98 daripada responden. Walaupun hutang tersebut tidak dinafikan dengan nyata oleh responden, mereka memohan masa untuk mengesahkan tuntutan tersebut tetapi perayu telah memulakan satu tindakan untuk menuntut balik wang yang terhutang itu. Selepas writ telah diserahkan, responden telah memfailkan kehadiran tak terhad.

Perayu telah memfailkan saman untuk penghakiman dan responden telah memfailkan satu permohonan untuk penggantungan tindakan sementara menunggu satu rujukan pertelingkahan kepada timbangtara. Saman perayu telah didengar sebelum permohonan responden dan oleh kerana responden gagal untuk memfail satu afidavit jawapan, penolong kanan pendaftar telah memasuki

penghakiman bagi pihak perayu setelah menolak permohonan responden untuk satu penangguhan. Responden telah merayu kepada hakim dalam kamar yang membenarkan rayuan tersebut dan mengenepikan penghakiman tersebut. Perayu telah merayu kepada Mahkamah Rayuan ('rayuan pertama'). Sementara itu, permohonan responden untuk penggantungan telah didengar oleh penolong kanan pendaftar yang mana telah menolak permohonan itu. Responden telah merayu kepada hakim dalam kamar yang membenarkan rayuan tersebut dan menggantungkan tindakan perayu. Perayu telah merayu terhadap perintah ini kepada Mahkamah Rayuan ('rayuan kedua').

Isu yang di hadapan Mahkamah Rayuan adalah: (i) samada kemasukan kehadiran tak terhad bermaksud mengambil satu langkah di dalam prosiding di bawah s. 6 Akta Timbangtara 1952 ('Akta tersebut') yang menghindarkan permohonan untuk penggantungan di dalam rayuan kedua; dan (ii) samada yang arif hakim Mahkamah Tinggi telah melakukan kesalahan apabila mengenepikan penghakiman terhadap responden di dalam rayuan pertama.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Kemasukan kehadiran tak terhad adalah merupakan mengambil satu langkah di dalam prosiding di bawah s. 6 Akta tersebut. Jika defendan bercadang untuk memohon untuk menggantungkan satu tindakan yang bergantung kepada s. 6 Akta tersebut, beliau mesti memasukkan satu kehadiran terhad sebelum menggerakkan mahkamah. Oleh kerana responden telah mengambil satu langkah di dalam prosiding, dia telah hilang hak untuk memakai s. 6 Akta tersebut. Dasar atas mana permohonan responden didirikan adalah tidak wujud dan penolong kanan pendaftar adalah betul apabila menggunakan budibicaranya untuk menolak penangguhan tersebut.

[2] Keterangan apabila diteliti secara keseluruhan dengan munasabahnya menyokong kesimpulan bahawa responden hanya ingin melengahkan pembayaran jumlah yang sebenarnya kena dibayar kepada perayu.

[3] Perintah penggantungan tindakan diketepikan. Penghakiman ringkas yang dimasuki oleh penolong kanan pendaftar terhadap responden adalah dikembalikan kepada fail.

[Rayuan-rayuan dibenarkan.]

Case(s) referred to:
Lee Brothers Construction Co v. Teh Teng Seng Realty Sdn Bhd [1988] 1 MLJ 459 ***(refd)***
Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(refd)***
Usahabina v. Anuar Yahya [1998] 2 CLJ Supp 131 ***(foll)***

Legislation referred to:
Arbitration Act 1952, s. 6

Arbitration Act 1950 [UK], s. 4(2)

For the appellant - Su Tiang Joo (Jayne Koe with him); M/s Cheah Teh & Su
For the respondent - Amudha Jayaraman; M/s Murali B Pillai & Assoc

Reported by Cindy Chan

JUDGMENT

Gopal Sri Ram JCA:

There are two appeals before us. With the consent of counsel we heard them together because they arise out of the same action and are closely connected. I will refer to them for convenience as the first and the second appeal respectively. The factual matrix against which they rest is as follows.

The respondent conducts the business of general insurance. On 1 October 1980, it entered into an agreement ("the underwriting agreement") with the appellant authorising the latter to underwrite insurance over such risks as fire and other perils. In return, the appellant was to receive a commission on the policies underwritten by it as well as its management expenses. The underwriting agreement contains a clause providing for arbitration in the event of a dispute or difference. It is of wide ambit.

Later, disputes arose between the parties. The appellant claimed that the respondent owed it RM445,753.98 as commission and management expenses. The respondent did not expressly deny this claim. Neither did it expressly admit liability. It merely said that it would have to go through its accounts to verify the appellant's claim.

The appellant was not prepared to wait. It wanted to recover the sum claimed. It did not rely on the arbitration clause. Instead it commenced an action for recovery. It caused a writ to be issued and served upon the respondent. The respondent entered an **unconditional** appearance to the writ. Thereafter, on 2 May 1995, the appellant took out a summons for judgment.

Later, on 17 May 1995, the respondent filed an application to stay the action pending reference of the dispute to arbitration. Both summonses were fixed for disposal before the senior assistant registrar. But the appellant's summons came on for hearing on a date earlier than that assigned to the respondent's summons for a stay. The respondent did not deliver an affidavit in answer to the summons for judgment. However, it moved the senior assistant registrar for an adjournment of the appellant's summons until its application had been

heard and disposed off. This application was strenuously resisted by the appellant. In the event, the senior assistant registrar refused the adjournment and entered judgment for the appellant on its summons. The respondent appealed to the judge in chambers. KC Vohrah J, who heard the respondent's appeal allowed it and set aside the judgment. He held that the appellant's summons ought to have been adjourned until the disposal of the respondent's application. It is against his order that the first appeal has been brought.

On a later date, the respondent's summons for a stay came on for hearing before the senior assistant registrar. It was opposed by the appellant. After hearing argument, the senior assistant registrar dismissed the respondent's application. The respondent then appealed to the judge in chambers. The appeal was heard and allowed by Mohd Noor Ahmad J, who directed that the appellant's suit be stayed. It is against this order that the second appeal has been preferred.

There is only one issue that has arisen for determination before us. It is an issue common to both appeals. It turns on the meaning of the words "any other steps in the proceedings" appearing in s. 6 of the Arbitration Act 1952 ("the Act"). That section reads:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

The effect of s. 6 has been fairly worked out in the several decided cases dealing with it. I do not think it useful to go through them all in this judgment. In summary they amount to this. An agreement to arbitrate does not deprive a court of jurisdiction to entertain a dispute to which that agreement relates. So, a plaintiff may in the face of such an agreement institute proceedings in the ordinary courts. However, the defendant to that action, if he be a party to the agreement, may compel the plaintiff to adhere to his bargain to arbitrate by asking the court to stay the action. He may do this by making an application under s. 6 of the Act. But there are conditions to be met before the court may exercise its discretion in the defendant's favour. One of these is that the defendant must not have taken "any other steps in the proceedings" before applying for a stay.

The primary question that has arisen acutely for decision in these appeals is whether the entry of an unconditional appearance amounts to a step in the proceedings. Here, as I have earlier observed, the respondent entered an unconditional appearance to the appellant's writ. If that is a step in the proceedings, then, the respondent obviously failed to satisfy an essential pre-requisite postulated by the section. If it does not, then two subsidiary questions arise. They are: first, whether. KC Vohrah J, was right in setting aside the final judgment entered by the senior assistant registrar; and second, whether Mohd. Noor Ahmad J, was right, on the material before him, in exercising his discretion in the respondent's favour.

Let me say at once that if the respondent had not taken a step in the proceedings, it would follow that the order of KC Vohrah J, was entirely correct. For, in my judgment, a defendant who has not taken a step in the proceedings has a legitimate expectation that he will be heard on his application for a stay of proceedings before the plaintiff's summons for final judgment is heard. See, for example, *Lee Brothers Construction Co v. Teh Teng Seng Realty Sdn Bhd.* [1988] 1 MLJ 459. Although this is an observation I make in the context of s. 6 of the Act, I am of the view that the proposition is of universal application in the realm of adjectival law. The decision of the Supreme Court in *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd.* [1994] 2 CLJ 716; [1994] 2 MLJ 97 illustrates the difficulties that are usually occasioned by adopting an opposite stance.

To return to the main issue, it has been held by several decisions at first instance that a defendant, by entering an unconditional appearance, does not take "a step in the proceedings" within the context of s. 6 of the Act. They were all considered by Augustine Paul JC, in *Usahabina v. Anuar bin Yahya* [1998] 2 CLJ Supp 131; [1998] MLJ 176; [1998] 2 AMR 1370. It is a decision upon which the appellant places utmost reliance.

The judgment in that case also contains a useful discussion of what the courts here and in England have held to constitute a step in the proceedings. After a careful survey of the relevant English case law upon the subject, the learned judicial commissioner (now a judge of the High Court), came to the conclusion that the entry of an unconditional appearance does indeed amount to a step in the proceedings. He did so on the basis that the equipollent United Kingdom statutory provision (s. 4(2) of the Arbitration Act 1950), by its language, expressly excludes the entry of an appearance as amounting to a step in the proceedings. That this is indeed the position appears sufficiently from a reading of s. 4(2) of the United Kingdom Arbitration Act 1950 which provides as follows:

> Notwithstanding anything in this Part of this Act, if any party to a submission to arbitration made in pursuance of an agreement to which the protocol set out in the First Schedule to this Act applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may **at any time after appearance,** and before delivering any pleading or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings. (Emphasis added.)

Section 6, however, makes no such qualification. It would appear from the judgment of Augustine Paul JC, that the decisions of Malaysian Courts that held the entry of an unconditional appearance not to amount to a step in the proceedings did so by acting upon English cases without properly appreciating that the two provisions – s. 6 of the Act and s. 4(2) of the United Kingdom statute – are differently constructed.

After a careful consideration of the cases upon the subject, I have reached the conclusion that *Usahabina v. Anuar bin Yahya (ibid)* was rightly decided and that the entry of an unconditional appearance does indeed constitute the taking of a step in the proceedings within s. 6 of the Act. I find it unnecessary to formulate my own reasons for arriving at my conclusion. Instead, I gratefully adopt all that was said by Augustine Paul JC upon the point in Usahabina. It follows that the line of cases that take the contrary view were wrongly decided and ought no longer to be followed. In my judgment, if a defendant intends to apply to stay an action in reliance of s. 6 of the Act, he must enter a conditional appearance before moving the court.

Since the respondent in the present instance had taken a step in the proceedings, it lost the right to invoke s. 6 of the Act. Its summons for a stay was doomed to failure when the appellant's summons for judgment came for disposal before the senior assistant registrar. It therefore had no legitimate expectation on the facts of the present case to have the summons for judgment adjourned until after its summons for a stay had been adjudicated upon. The senior assistant registrar was accordingly correct in exercising discretion in refusing an adjournment. The respondent had done nothing to resist the summons for judgment. It erroneously thought that its right to apply for a stay was still extant because of the preponderance of authorities in support of the view it took. KC Vohrah J, acting upon what was at the time considered to be persuasive authority, directed that the respondent's summons for stay ought

to be heard before the appellant's summons for judgment. Had he come to the conclusion, as I have, that the respondent had taken a step in the proceedings he would not have made the order that he did. It is now apparent that the foundation upon which the respondent's application rested was non-existent and that the senior assistant registrar was accordingly right in rejecting the ground relied on by the respondent for seeking an adjournment.

But was the senior assistant registrar right in entering judgment summarily without granting the respondent an opportunity to deliver an affidavit in reply to the appellant's summons? Having regard to the circumstances that exist in the present case, I think he was. This is not a case where the material relied upon by a defendant raises a *bona fide* triable issue. There was no denial of liability or quantum. There was a mere request for time to verify the claim. But, as the evidence in the record of appeal shows, the amount claimed by the appellant was extracted from the respondent's own accounts. Hence, the evidence when taken as a whole reasonably supports an inference that the respondent was merely delaying in making payment of a sum that is justly due to the appellant.

After carefully scrutinising the documentary evidence in the record provided to us, I am more than satisfied that it would have made not the slightest difference to the final result even if an adjournment had been granted and the respondent had put in an affidavit in opposition. No injustice was consequently occasioned to the respondent in all the circumstances of the case.

Although the summons for stay was later proceeded with, the matter is not entirely academic in that sense because of the judgment that had been entered against the respondent. Consequently, I would allow the first appeal, set aside the order of the learned judge and restore the order of the senior assistant registrar.

That brings me to the appeal against the order of Mohd Noor Ahmad J. Here again, the learned judge apparently proceeded upon the basis that the respondent had satisfied all the pre-requisites set out in s. 6 of the Act. He took the view that the entry of an unconditional appearance did not amount to a step in the proceedings. In so holding he was obviously acting upon the line of Malaysian cases that were, in my view, wrongly decided. That is why he reversed the senior assistant registrar and directed a stay of the action. For the reasons already given, he ought not to have done so. I would therefore also allow the second appeal.

In the result, both appeals are allowed. The order staying the action is set aside. The judgment summarily entered by the senior assistant registrar against the respondent is restored to file. The respondent must bear the costs at all levels including those occasioned by these appeals.

My learned brothers Abdul Malek Ahmad and Haidar Mohd. Noor JJCA have seen this judgment in draft and agree with the reasoning and the conclusions therein.

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